U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue date: 14Nov2001

DATE:
CASE NO. 2001-INA-100

In the Matter of:

902 EXPRESS SANDWICH SHOP, INC.
Employer

On Behalf of:

HANNA TAWFIK
Alien

Appearance: Earl S. David, Esquire
For the Employer

Certifying Officer: Dolores Dehann
New York, NY

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States

who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On or about January 20 2000, the Employer, 902 Express Sandwich Shop, Inc., filed an application for labor certification to enable the Alien, Hanna Tawfik, to fill the position of "Cook," which was re-classified by the Job Service as "Cook, Specialty Foreign." (AF 12-13). The job duties for the position, as stated on the application, are as follows:

> Prepare & cook Mediterranean cuisine including Humus, Babaganoush, Foule Moudammus. Estimate food cost & garnish food according to menu.

(AF 13). The only stated job requirement for the position is: 2 years of experience in the job offered (AF 13).

The CO issued a Notice of Findings ("NOF") on October 23, 2000, in which she proposed to deny certification on the following grounds: 1) the petitioning company did meet the regulatory definition of "Employer," as set forth in §656.3; and, 2) the requirement for a Cook, Specialty Foreign Food is unduly restrictive under §656.21(b)(2). On November 27, 2000, the Employer sought an extension for filing its rebuttal, which was granted by the CO (AF 20). Thereafter, on January 2, 2001, the Employer submitted its rebuttal (AF 21-33). However, the CO found the rebuttal unpersuasive, and issued a Final Determination, dated January 18, 2001, denying certification on the same bases (AF 34-36). Subsequently, the Employer appealed the Final Determination (AF 45), and the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

Discussion

20 C.F.R. §656.3 states, in pertinent part:

Employer means a person, association, firm, or a corporation which currently has a

> location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

20 C.F.R. §656.3.

In the NOF, the CO cited the above regulation and stated:

> Several attempts were made to reach the employer at the telephone shown in item 4 on the ETA-750A form, (631) 501-1795 during the hours shown in item 11 on the form. While the phone rang there was never any answer. We also attempted to locate a listing for the employer in the Bell Atlantic Business Yellow Pages for the Nassau/Suffolk (Farmingdale) area but found none. Directory Assistance also had no record of the restaurant. Based on this we question that this business meets the above cited definition of "Employer."
>
> To rebut, employer must submit evidence which clearly and fully demonstrates compliance with the above cited regulation. Documentation must include, but is not limited to, a copy of employer's New York State issued document showing employer's current Unemployment Insurance Tax Identification Number, copy of lease or rental agreement for doing business at the location shown in item 6 of the ETA-750A form, copy of business rent receipts for same location for the 12 months immediately prior to date of this Notice, copy of latest business telephone bills for the number shown in item 5 or for employer's present business telephone number, copy of business tax returns for the last three years, total number of employees in the business and their position titles, and original menu for the restaurant.

(AF 17).

The Employer's rebuttal, in pertinent part, consists of a cover letter by its attorney, dated January 2, 2001 (AF 33), and various documents, including copies of two telephone bills (AF 29-32) and a bill of sale, dated September 30, 1997 (AF 26-28). In addition, the CO acknowledged receipt of a copy of a lease agreement and photos of the business premises (AF 35).

In the Final Determination (AF 34-36), the CO stated, in pertinent part:

> As a result of our unsuccessful attempts to verify the viability of this business, Notice of Findings requested employer to submit documentation which clearly and fully established that the business met above cited definition of "Employer." The Notice was specific regarding the evidence required. In rebuttal, employer submitted two copies of

> two telephone bills, one for billing date of July 7, 2000 and another for billing date of October 7, 2000. The July statement reflects account number as "631 501-1795 581 275" which appears to represent the number in item 5 on the Eta-750A form. The October statement shows a different number, "631 694-7970 777 270." This discrepancy was not addressed. Employer also submitted a copy of a lease agreement and photos of business premises; however, other documentation which the Notice specifically indicated was required was not furnished. Employer did not submit a copy of his New York State issued document showing his current Unemployment Insurance Tax Identification Number, did not submit copy of business rent receipts for the 12 months immediately prior to the date of the notice, did not submit copy of business tax returns for the last three years, did not document total number of employees in the business along with their position titles and did not furnish original menu for the restaurant. Since such evidence should have been readily accessible to employer and he does not address why he was unable to furnish it, it is determined that employer has failed to adequately demonstrate compliance with above cited regulation.

(AF 35). We agree.

It is well settled that a petitioner must provide relevant and reasonably obtainable documentation requested by a CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988 (*en banc)*; *see also Kogan v. Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991)(where petitioner was required to provide business license and/or other documentation to prove the existence of an ongoing business and job opening); *Koam Poultry Technical Service*, 90-INA-596 (July 17, 1992)(where petitioner failed to document that it was an "Employer," as it did not adequately document that it withheld taxes, social security, or other unemployment insurance).

Assuming *arguendo* that the petitioner had established that it is an "Employer" as defined in the Act and regulations, the labor certification petition would still be denied. The second basis for the CO's denial of certification was that the foreign cooking requirement is unduly restrictive We agree. .

In the present case, the CO directed the petitioner to demonstrate that the foreign cooking requirement arises from business necessity or delete the requirement (AF 17-18). Instead, the petitioner deleted the word "Mediterranean" from its description of the duties and alleged that it was thereby deleting the foreign cooking requirement (AF 33; AF 23, Item 13; *Compare* AF 13, Item 13). As stated by the CO in the Final Determination:

> This amendment does not significantly alter the position as employer retained the specific foreign dishes originally required. Since employer failed to delete the foreign dishes and failed to furnish restaurant menu to demonstrate that such dishes are offered to such an extent that they would require a full-time Cook to prepare and cook these dishes on a 40-hour basis, it is held that the position requirements are still unduly

restrictive. Employer has failed to adequately establish business necessity for the position.

Due to the above deficiencies the application is **denied**.

(AF 35-36).

In its request for review, the Employer merely reiterated its previously stated positions; namely, that it had agreed to remove the foreign foods requirement; and, it had submitted proof of the company's existence (AF 45).

Upon review, we find little merit to the Employer's appeal. As set forth above, the Employer only deleted the word "Mediterranean," while maintaining the same underlying foreign food requirement (AF 13, 23). Furthermore, the CO failed to comply with the CO's reasonable requests for documentation regarding its status an "Employer" under the Act and regulations. Accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.